



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAY 10 2013** OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an elementary school teacher for [REDACTED]

[REDACTED] The petitioner currently teaches kindergarten at [REDACTED]. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and copies of recent assessment scores.

Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –

(A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer –

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term “national interest.” Additionally, Congress did not provide a specific definition of “in the national interest.” The Committee on the Judiciary merely noted in its report to the Senate that the committee had “focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . .” S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (NYSDOT), 22 I&N Dec. 215 (Act. Assoc. Comm’r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien’s past record justifies projections of future benefit to the national interest. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term “prospective” is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on January 9, 2012. On that form, the petitioner listed her occupation and job title as “Math & Science Elementary Teacher.” The accompanying job description suggests that her duties will be more general than the implied specialization in math and science: “Teach math and science, reading and social studies to public school students ages 5-6 using differentiated instructions, academic rigor, computer-aided instructions.” Counsel’s introductory statement did not address the *NYSDOT* guidelines. Instead, counsel listed the petitioner’s initial exhibits and asserted that USCIS should “permit her to continue serving the improvement of Science

and Math Elementary Education in the country.” Counsel stated that the petitioner “stands to earn a commanding annual salary of \$82,873.00 which is above the Level 4 Wage of only \$79,790.00.”

The initial filing included a “Narrative Resume” written in the third person, but signed by the petitioner. The statement detailed the petitioner’s teaching career since 1982. The statement credited the petitioner with “perseverance, love for teaching . . . promptness and diligence” and indicated that “[s]he exhibits all what [sic] it takes to be a team player.”

The petitioner submitted a partial copy of an article, [REDACTED] that was the cover story in the August 3, 2008 issue of the [REDACTED]. The petitioner (pictured on the cover) is the focus of the article, not because of her achievements as a teacher, but as an illustrative example of a trend of school systems hiring teachers from the Philippines, as well as the challenges that those teachers face. The article chronicled some of the petitioner’s experiences both on and off the job, but did not indicate that the petitioner’s past or present work has had any particular impact outside of the schools where she has taught. Under the headline ‘[REDACTED]’ the magazine cover reads, in part: “Desperate for qualified teachers, [REDACTED] has imported hundreds from the Philippines.” The text of the article indicated that “teachers from the Philippines [are] an increasingly popular source of manpower for U.S. school systems,” and that “Filipino teachers [constitute] one-fifth of the . . . classroom instructors” at [REDACTED] where the petitioner taught at the time.

The August 4, 2008 issue of the [REDACTED] included a story, “[REDACTED]” that repeated the main points in the [REDACTED] article, such as the assertion that [REDACTED] employed “about 400” teachers from the Philippines, and that “[s]alaries for teachers with 20 years experience and a master’s degree can be more than \$80,000.” This last assertion indicates that the petitioner’s salary of slightly more than \$80,000 is a function of experience and degrees, rather than a reflection on the petitioner’s own specific, unique contributions to the teaching field. Degrees and experience can contribute to a claim of exceptional ability under the regulations at 8 C.F.R. §§ 204.5(k)(3)(ii)(A) and (B), but, as noted previously, exceptional ability does not assure approval of the national interest waiver.

The petitioner submitted three letters that she received after the [REDACTED] article appeared. Former [REDACTED] invited the petitioner to her church to meet with a prominent priest from the Philippines. [REDACTED] a retired [REDACTED] teacher, sent the petitioner several pages of “tips” on how to handle her classroom. An anonymous third author sent the petitioner several prepaid phone cards to help the petitioner “keep in touch with [her] family.” The letters expressed empathy and professional solidarity, but none of the authors indicated that the petitioner stood out as a teacher, apart from being arbitrarily selected as the subject of an article.

The petitioner submitted copies of certificates she received from various employers in the Philippines and the United States. Some certificates recognized the petitioner’s “contributions” without actually identifying them. The most specific certificate is an [REDACTED] recognizing the petitioner:

For her way of infusing excitement in learning mathematics that provided the Grade One pupils a strong incentive to become involved in class. For writing and executing lesson plans with effective social relevance and values integration in her class. For trying and experimenting all sort of strategies in her Grade One lessons. Tapping resource persons, Giving tests in paragraph form, Story telling in Math

The record does not indicate the extent, if any, to which other schools adopted the petitioner's "creative strategies." Such strategies can be a way for a teacher to influence the field, but only if schools over a wide area actually implement them. It cannot suffice for the petitioner to show that her work was original or creative, because originality does not equal impact or influence. Like education and experience, recognition for contributions is a qualifying factor to show exceptional ability, which does not waive the job offer requirement. *See* 8 C.F.R. § 204.5(k)(3)(ii)(F).

Letters from teachers, administrators, and a former student attested to the petitioner's experience and to her reputation within the schools where she has worked, but these assertions amounted to general praise rather than to unique factors that especially qualified the petitioner for the waiver. Likewise, favorable performance evaluations do not establish eligibility, because the threshold for the waiver is not mere professional competence or acceptable performance of duties.

The director issued a request for evidence on June 5, 2012, stating that the petitioner's initial submission "did not identify specific contributions of the alien that have had an impact on the field as a whole." The director instructed the petitioner to submit documentary evidence to meet the guidelines set forth in *NYSDOT*.

In response, the petitioner submitted a statement in which counsel repeatedly referred to the petitioner as "a Math Teacher" and discussed a claimed crisis in math education. As noted previously, the record does not indicate that the petitioner is a specialized math teacher. Rather, the petitioner's evidence shows that she teaches math along with several other subjects as part of a generalized kindergarten curriculum. Background evidence about the importance of math education, and the need for reform therein, is not specific to the petitioner and does not distinguish her from others in her field.

Counsel stated:

Since a 'National Mathematics Teacher' is not even a real concept but more of metaphysical cognition [*sic*], undersigned wishes to once again posit a realistic proposition upon which to establish that the self-petitioner's contributions will impart national-level benefits.

Even authors of books, treatises and other academic materials on Math Education are not in any standing [*sic*] to claim that their contributions are national in scope since not all Mathematics Teacher [*sic*] can be said to utilize their works.

The director did not state that the petitioner had to show that she is “a ‘National Mathematics Teacher,’” or that “all Mathematics Teacher[s] . . . utilize [her] works.” National scope is not the same as universal reliance on the petitioner’s work.

Counsel stated: “if an NIW Petition is made with premise on some prevailing Acts of United States Congress, that by itself renders the proposed employment national in scope.” This assertion is not persuasive. All employment-based immigrant classifications are based on “prevailing Acts of United States Congress,” and so is the statutory job offer requirement. There is no basis to conclude that Congress, by mentioning a given occupation in a particular piece of legislation, exempted aliens in that occupation from the job offer requirement.

Counsel quoted remarks made by then-President George H.W. Bush when he signed the Immigration Act of 1990, which created the national interest waiver: “This bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood and new ideas.” Counsel interpreted this passage to mean that Congress created the national interest waiver for educators. The Immigration Act of 1990, however, was not restricted to the creation of the waiver. It was, rather, an overhaul of the entire immigration structure. “[S]cientists and engineers and educators” are all members of the professions who, under the terms dictated by Congress in the Immigration Act of 1990 (as it amended the Immigration and Nationality Act), are all subject to the job offer requirement. The national importance of “education” as a concept, or “educators” as a class, does not lend national scope to the work of a single kindergarten teacher.

Counsel asserted that the No Child Left Behind Act (NCLBA) requires public schools “to employ highly qualified teachers.” Counsel then quoted parts of section 1119 of the NCLBA. The quoted sections concern the minimum requirements for “new paraprofessionals” rather than teachers. Section 9101(23) of the NCLBA, 20 U.S.C. § 7801(23), defines the term “highly qualified” in reference to teachers. Sections 9101(23)(B) and (C) of the NCLBA require that a “highly qualified” teacher “holds at least a bachelor’s degree.” Section 9101(23)(B) of the NCLBA also refers to “highly qualified” teachers who are “new to the profession.” Thus, neither the petitioner’s master’s degree nor her “thirty (30) years of professional work” are required for “highly qualified” status under the NCLBA. Counsel, therefore, has not provided evidence to support the claim that the labor certification process frustrates the NCLBA’s mandate for schools to employ “highly qualified teachers.” Elsewhere in the same statement, counsel acknowledged that the “labor certification process would turn in highly qualified, willing and available U.S. workers,” but counsel claimed that the process “would not produce identically passionate teacher [sic] as [the petitioner], in terms of effectiveness especially since she has already been tested by her assigned school and has proved her worth to the students.” Counsel cited no support for the assertion that prior experience with the intending employer intrinsically overrides the job offer requirement or otherwise establishes eligibility for the waiver. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel contended that privacy considerations make it “impossible” to compare the petitioner’s contributions to those of other qualified workers. *NYSDOT*, however, does not require the petitioner to compare her private or proprietary records with those of other teachers. Rather, the petitioner must establish a record of influence on the field as a whole. To do so does not require an invasive review of other teachers’ credentials. Rather than establish such a record of influence, counsel has asserted that the *NYSDOT* guidelines ought not apply to “math teachers.” The petitioner has failed to establish that *NYSDOT* guidelines do not apply to math teachers, or to teachers in general.

In a new statement, the petitioner stated that her experience and education have provided her with “exemplary teaching skills that produced tangible results of students’ success,” such that “almost all” of her students were able to read at grade level by the end of the school year. (This is one of several statements by the petitioner herself, indicating that she teaches subjects other than math and science.) The petitioner noted that she has also participated in summer programs and tutoring, beyond her basic duties. At issue is not the petitioner’s competency or credentials as a teacher, or her dedication to the profession. Rather, the petitioner seeks a benefit over and above the underlying immigrant classification. By statute, the threshold for that benefit is not professional dedication or solid qualifications, but the national interest. In the absence of more specific guidance, *NYSDOT* set forth a blueprint for how one might meet that threshold. As a published precedent decision, *NYSDOT* is binding on all USCIS employees. See 8 C.F.R. § 103.3(c). The petitioner has failed to establish, by a preponderance of the evidence, that she meets the *NYSDOT* guidelines.

The director denied the petition on December 12, 2012. The director listed several of the petitioner’s evidentiary exhibits and quoted several witness letters, but found that the evidence did not show “how the benefits of her employment will be national in scope.” The director cited various points articulated in *NYSDOT*, and stated: “The petitioner has not established that Congress intended the national interest waiver to serve as a blanket waiver for all teachers.”

On appeal, counsel notes that Congress passed the NCLBA three years after the issuance of *NYSDOT* as a precedent decision, and claims that “the United States Congress, with the enactment of the **NCLB Act**, has preempted the USCIS with respect to the parameters that should guide its determination” regarding the waiver claim (counsel’s emphasis). Counsel, however, identifies no special legislative or regulatory provisions that exempt school teachers from *NYSDOT* or reduce its impact on them.

The assertion that the NCLBA modified or superseded *NYSDOT* is not persuasive; that legislation did not amend section 203(b)(2) of the Act. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95 (November 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to that Act, to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not established that the NCLBA indirectly implies a similar legislative change.

Turning to immigration legislation, counsel states:

With respect to the E21 visa classification, INA § 203(b)(2)(A) provides in relevant part that: “Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the **national . . . educational interests**, . . . of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.”

Counsel, above, highlighted the phrase “national educational interests,” but the very same quoted passage also includes the job offer requirement, *i.e.*, the requirement that the alien’s “services . . . are sought by an employer in the United States.” Counsel has, thus, directly quoted the section of relevant law that supports the director’s conclusion. By the plain wording of the statute that counsel quotes on appeal, an alien professional holding an advanced degree is presumptively subject to the job offer requirement, even if that alien “will substantially benefit prospectively the national . . . educational interests . . . of the United States.” Neither the Immigration and Nationality Act nor the No Child Left Behind Act, separately or in combination, create or imply any blanket waiver for teachers. On appeal, counsel maintains “it has been demonstrated that . . . the bench mark of [the petitioner’s] request for waiver [is] compliance with the No Child Left Behind Act of 2001.” Counsel has failed to establish this claim.

Counsel asserts that there remains a pressing need for educational reform, because past efforts such as Teach For America have not produced satisfactory results. This is a general claim that addresses the intrinsic merit of the petitioner’s profession, rather than a point specifically in the petitioner’s favor. Counsel does not claim that the petitioner’s achievements qualify her for the waiver under *NYSDOT*. Instead, counsel has relied entirely on the incorrect assumption that *NYSDOT* does not apply to teachers such as the petitioner.

As is clear from a plain reading of the statute, engaging in a profession (such as teaching) does not presumptively exempt such professionals from the requirement of a job offer based on national interest. Congress has not established any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.